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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5932

JOHN DOE and JANE ROE

—v.—

STATE OF DELAWARE

ON APPEAL FROM THE SUPREME COURT OF DELAWARE

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

INTEREST OF AMICUS*

The American Civil Liberties Union is a nationwide non-partisan organization of more than 200,000 members dedicated to defending the principles embodied in the Bill of Rights. The Children's Rights Project is a special project of the ACLU

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* Letters of consent from the parties to the filing of this brief *amicus curiae* have been filed with the Clerk of the Court.

dedicated to asserting and defending the rights of children. Central among those rights are the child's right to a stable home and to a parent-child relationship free from unwarranted state intrusion. The Children's Rights Project has participated in numerous cases throughout the United States involving the respective rights of parents and children in termination proceedings as well as cases directed at improving conditions for children who have been removed from their homes and placed in the custody of the state.

INTRODUCTION AND STATEMENT OF THE CASE

This case originated on July 2, 1975, in Delaware Superior Court when the Delaware Department of Health and Social Services (hereinafter "the Department") filed a petition seeking to terminate the parental rights of John Doe and Jane Roe with regard to their five children. On September 12, 1975, without appointing counsel to represent the children, and without considering the alternative placement options available for the children, the Superior Court summarily terminated the parents' and children's rights to continue their family relationship, upon finding that evidence concerning the parents demonstrated that they were "not fitted" to continue to exercise parental rights.[1/]

1/ The sole Delaware statutory basis for termination of parental rights presented by the Department's petition was 13 Del. Code § 1103(4), which provides for termination when:

> the parent or parents of any such child, or any person or persons or organization holding parental rights over such child are not fitted to continue to exercise parental rights.

This statute is the only Delaware statute challenged by parent-appellants in this Court.

However, this initial determination was reversed and the case remanded by the Delaware Supreme Court on September 28, 1976, because the trial court had neglected to make a determination concerning whether termination of parental rights was in the "best interests of the child," which the Delaware Supreme Court held to be another "essential prerequisite for an order of termination of parental rights" under 13 Del. Code § 1108.[2] (Appendix at 1c.)

Upon remand, and following another hearing, the trial court again terminated parental rights in a letter opinion dated December 30, 1976. (Appendix at 1d) Once again the court failed to appoint separate counsel for the children, or to investigate

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2/ 13 Del. Code § 1108 provides, in relevant part:

> (a) Should the Court find the termination of existing parental rights and their transfer to be in the best interests of the child, it shall make an order terminating such rights in the parent or parents . . . and transferring them to some other person or persons or authorized agency or the state Department of Health and Social Services as may, in the opinion of the Court, be best qualified to receive them.

(emphasis added)

the placement options available for them. The only testimony presented at the hearing on remand by any expert witness who had actually interviewed the children indicated that they had a "good relationship" with their parents. The trial court's December 30, 1976, letter opinion included the stated conclusion that "it is in the best interests of the children that" their relationship with their parents be terminated, (Appendix at 3d) as the Delaware Supreme Court had instructed, but it did not include a single word indicating why this was so. Although the particular matters considered upon remand were different, every specific finding in the December 30, 1976, trial court opinion concerned the parent's behavior and "fitness," not the children's separate "interest" in the termination.

As far as the children's separate "interest" was concerned, the proceedings upon remand were thus utterly redundant: the second trial court opinion merely recapitulated the first opinion, with the hollow addition of the single new phrase quoted above. The Delaware Supreme Court specifically noted, in reviewing the second trial court opinion, that the trial court had refused to admit or consider evidence

concerning "post foster home placement or evidence as to the State's planning for the future of the children," (Appendix at 15a) but that court nonetheless affirmed the second trial court decision on August 24, 1979.

On March 24, 1980, this Court noted probable jurisdiction of this appeal from the Delaware Court's August 24, 1979, judgment with regard to three questions: whether the Delaware statute's "not fitted" standard for terminating parental rights is unconstitutionally vague, whether parent-child relationships can be terminated by the state upon an ordinary "preponderance of the evidence" test, and whether due process requires the state to demonstrate a compelling state interest before terminating parental rights.

However, despite the five-year long history of this case, another set of critical questions concerning the individuals who have the most to gain or lose from these proceedings has not been presented to either of the courts below or raised in this Court. The decision of the Delaware Supreme Court did not merely rest upon a vague statute concerning the issue of parental "fitness." It also rested upon a conclusion that

termination of parental rights was "best" for these children, under a legal standard that was just as vague on its face as the "unfitness" statute challenged by the parent-appellants and that was applied to these children without the slightest inquiry into what the future might actually hold for them. Moreover, although the Delaware Supreme Court specifically acknowledged that parents, children, and the state have distinct interests in proceedings to terminate parental rights (Appendix at 10a-11a), it nonetheless permitted a final judgment affecting fundamental liberty interests to be entered following a trial at which only two of those three parties were represented by counsel.

These five children -- incompetent as a matter of law to represent their own interests -- thus had their most basic human rights finally adjudicated by an American court without the benefit of counsel, and without the the introduction of a scintilla of evidence to show that the essential state law pre-requisites for such a drastic and permanent curtailment of their most fundamental freedoms existed in fact. Indeed, these children's interests

are not even independently represented in this Court.

The result of the lower courts' failure to assure that the children's separate interests be represented by separate and independent counsel has been a proceeding that is fundamentally unfair, under the Constitution, and inadequate under the plain meaning of state law. Consequently, this Court should remand this case for further factual findings concerning the children's true "best" interest in a proceeding where the children are separately represented by independent counsel or a guardian ad litem. Where a statutory prerequisite for termination has not been established by evidence, and where the state's highest court has knowingly permitted a concededly separate, constitutionally cognizable interest to go wholly unrepresented, fundamental fairness requires such a remand.

This is not to concede, however, that termination of parental rights is constitutionally permissible merely upon a showing that it is in the child's "best interest" to do so. The point is, rather, that even constitutionally adequate substantive

standards may not be applied in an unfair proceeding. For this Court even to address the substantive standard on the basis of the record presented here would violate these children's due process rights.

SUMMARY OF ARGUMENT

Numerous prior holdings of this Court have acknowledged,and by now clearly established, the extraordinary protection the Constitution affords to family life.

Yet while the family as a unit has certain clearly established rights as against the state, the proper apportionment of these rights among the various members of a family still presents difficult and novel questions. Particularly difficult is the situation presented when the state seeks to intervene in a family on behalf of one family member against another. See generally, Developments in the Law -- the Constitution and the Family, 93 Harv. L. Rev. 1156, 1221-1242 (1980). In such parent-child conflicts, ordinary presumptions concerning the identity of parent-child interests, see Parham v. J.R., 442 U.S. 584 (1979), cannot be indulged. On the other hand, to concede that the normally identical interests of parent and child are in conflict whenever the state seeks to intervene -- and that the state is always fit to represent the child's interest in such situations -- is to concede the state its case before it makes a factual showing.

A review of current constitutional doctrine makes clear that children, as well as adults, have a fundamental, constitutionally-protected interest in the integrity of their family life, and that their interest is legally and practically distinct from the interests of the other parties to a parental termination proceeding (Point I). Consequently, only the mandatory provision of separate counsel to children involved in such proceedings can assure that state intervention in family life is accomplished in a manner that is fundamentally fair (Point II).

POINT I

THE CHILDREN'S SEPARATE INTEREST IN PROCEEDINGS TO TERMINATE PARENTAL RIGHTS IS CONSTITUTIONALLY "FUNDAMENTAL" AND ITS RECOGNITION BY THIS COURT IS OF THE HIGHEST PRACTICAL IMPORTANCE TO THE CHILDREN'S LIVES

A. The Prior Rulings Of This Court Clearly Establish The Fundamental Nature Of The Rights Of Parents And Children To The Integrity Of Their Families.

This Court has made it abundantly clear that individuals have a right to privacy and autonomy in their family lives that is entitled to the most rigorous substantive and procedural constitutional protection. Thus, it is beyond serious question that the family unit enjoys a right to be free of unwarranted state interference except under the most compelling circumstances.[3] See,

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[3] It is also clear, as parent-appellants have argued, that determining such fundamental rights according to an ordinary "preponderance of the evidence" test is constitutionally inadequate. It is plain that severing a parent-child relationship forever is at least as serious an abridgement of personal liberty interests as a temporary, and reversible, commitment to an institution for the mentally ill. Yet the Court has already held the "clear and convincing" standard to apply to such cases. See Addington v. Texas, 441 U.S. 418 (1979).

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e.g., Parham v. J.R., 442 U.S. 584 (1979); Zablocki v. Redhail, 434 U.S. 374 (1978); Moore v. City of East Cleveland, 431 U.S.

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As the Court pointed out in that case,

> Increasing the burden of proof is one way to impress the fact-finder with the importance of the decision and thereby perhaps reduce the chances that inappropriate commitment will be ordered.

Addington v. Texas, supra, at 427. As this Court has already noted, "judges. . . may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on subjective values." Smith v. OFFER, 431 U.S. 816, 835 (1977). Where the substantive standard for a government determination affecting fundamental rights is so intrinsically elusive and inherently subjective as those ordinarily applied in termination proceedings, "impressing the factfinder with the importance of the decision" is all the more important. In framing the analogous federal standard in this area, Congress has recently provided, with regard to Native American children, that

> No termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(f) (emphasis added). The federal standard thus requires both a higher degree of certainty on the part of the fact-finder and a more narrowly focussed factual finding than does Delaware.

494 (1977); Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Pierce v. Society of Sisters, 268 U.S. 510 (1925). Although the right to privacy and autonomy in family life clearly antedates the Constitution, and is presupposed by it, it is not specifically mentioned in the Constitution. Nevertheless, the Court has found it to permeate the entire Bill of Rights, and has derived its specific holdings in this area from the First, Ninth and Fourteenth Amendments. See, Roe v. Wade, supra at 152-53. Regardless of its uncertainty concerning the precise textual basis of this right, the Court has throughout this century been completely consistent in acknowledging the existence of a "private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). See also Moore v. City of East Cleveland, supra, at 499; Smith v. Organization of Foster Families for Equality and Reform, supra, at 842.

The Court's consistent recognition of

this right to family integrity has frequently derived from its general concern for individual privacy, Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Roe v. Wade, supra at 152-53; Carey v. Population Services International, 431 U.S. 678, 687-89 (1977), as well as the fundamental freedom of individuals to associate without first seeking the approval of the state. See Moore v. City of East Cleveland, supra. See also Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, supra. But the Court has also specifically recognized the unique and special function the family performs in our society in a manner that is directly relevant to the issues presented here.

In Moore v. City of East Cleveland, the Court said

> Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural. Moore v. City of East Cleveland, supra, at 503-4. (footnotes omitted)

Created by history and tradition, of primary "moral and cultural" value as well as fundamental constitutional significance, the family is thus something more than just another protected legal entity.

The less serious a state intrusion into family life, of course, the less the Constitution requires by way of justification, whether the intrusion concerns state limitations on absolute parental authority, see, e.g., Prince v. Massachusetts, supra, or on the autonomy of a child. Parham v. J.R., supra. However, when the state seeks to extinguish the tie that binds parent to child permanently, only the most "powerful countervailing interest[s]" can outweigh the rights abridged by termination. See, Stanley v. Illinois, supra, at 651. When fundamental rights are absolutely threatened (as opposed to when lesser rights are merely limited), the Constitution requires that the proposed state intrusion be tailored precisely to fit the legitimate end the state seeks to achieve. Zablocki v. Redhail, supra, at 388. Consequently, when the proposed state intrusion is permanent termination of the rights of parent and child to have any relationship at all with each other and when the

declared aim of this intrusion is the child's "best interests," the state must meet a particularly heavy burden.[4/]

[4/] Amicus sees no conflict between its position and the position of parent-appellants concerning the alleged vagueness of 13 Del. Code § 1103(4), permitting termination upon a finding that the parent is "not fitted to continue to exercise parental rights." That statute is so lacking in definiteness that a parent of common intelligence is incapable, with the best of intentions, of conforming his or her behavior to its requirements. See generally Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Of greater importance to the issues presented in proceedings to terminate parental rights, however, is that strand of the "void for vagueness" doctrine which concerns the excessive discretion accorded to administrators or enforcement officials by vague statutes. See Grayned v. City of Rockford, 408 U.S. 104 (1972). The extraordinary danger of discriminatory and arbitrary enforcement, where the government official is required to evaluate the general capacity of another person, ordinarily a member of a different social class and frequently of a different racial and cultural background from the decision-maker, in the complex and intrinsically subjective field of "good" child-rearing is self-evident. Moreover, a child whose relationship with a parent is severed unnecessarily is harmed by that loss even more than the parent. See Alsager v. District Court of Polk Co., Iowa, 406 F. Supp. 10 (S.D. Iowa), aff'd 545 F.2d 1137 (8th Cir. 1976).

Although the Court has most frequently elaborated the constitutional rights of families in the context of defending parents against the state, see, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923); Skinner v. Oklahoma, 316 U.S. 535 (1942); Cleveland Board of Education v. LaFleur, supra; Griswold v. Connecticut, supra; Roe v. Wade, supra; Stanley v. Illinois, supra; Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, supra, a careful examination of its decisions shows that "family rights" as against the state inhere separately and reciprocally in the children as well. For example, the Court held in Smith v. Organization of Foster Families for Equality and Reform, supra, at 844 that the constitutional protection accorded to the family was based on the "emotional attachments that derive from the intimacy of daily association." It is plain that all such intimate "emotional attachments" are necessarily reciprocal ones, in which each of the participants has a linked, but plainly separate, interest. Similarly, in Quilloin v. Wolcott, supra, the primary basis of the Court's decision was the existence of a reciprocal, caring relationship form which the child actually derived ongoing emotional support

and sustenance, even though that relationship was counterposed against a "natural family" link. See, e.g., Quilloin v. Walcott, supra. In light of these holdings, and the well-established rule that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," In re Gault, 387 U.S. 1, 13 (1967), it is clear that children's interests in termination proceedings are separate from parents' interests, and are at least as significant in clearly settled constitutional terms as the interests of parents.

B. The Children's Separate Interest In Proceedings To Terminate Parental Rights Is Especially Great Because Of the Further Constitutional Deprivations Which Often Result.

Although parents and children have reciprocal, and therefore equal, interests in their "emotional attachments that derive from the intimacy of daily association," the interest of the child in proceedings brought by the state to terminate parental rights is distinguishable from the parents', and is even greater. For the parent, termination of parental rights means losing his or her "emotional attachment" with someone else. For the child, it means losing those attachments, but it also means being

swept into the permanent custody of a child welfare bureaucracy, which acquires plenary power to make unreviewable decisions affecting all of the child's constitutional and other rights. In theory, this enhanced state power will always be exercised benevolently. In practice, it is not. Consequently, it is the child, rather than the parent, who stands to lose the most in a proceeding to terminate parental rights. The child loses everything the parent loses, and usually much more.

Termination of parental rights is often justified as a necessary prerequisite to moving a child into a new adoptive home. The fact is, however, as study after study has demonstrated, that children remain for years, often throughout their entire childhood, in the legal limbo of foster care, being moved from place to place, without ever being provided with a permanent adoptive home.5/

5/ See, Children Without Homes at p. 6 (Report prepared by the Chilren's Defense Fund, 1978)

> Children remain in care for long periods of time, often moving from place to place, without the chance to experience stable caring from any adult. In our survey, 13 percent of the children had been out of

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Independent of the anguish children experience whenever they are permanently separated from their parents and siblings is the negative impact of foster care itself. Because of the shortage of dedicated and concerned foster families, states are often forced to place children inappropriately in families or impersonal institutions where their needs cannot be met.[6/] Additionally, studies indicate a high incidence of physical abuse or mistreatment

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> their own homes for over four years, and an additional 20 percent for over six years. In all, 52 percent had been in out-of-home care for two or more years. Moreover, the responding survey counties reported that 18 percent of the children in out-of-home care had been moved more than three times.

6/ See, A. Kadushin, Child Welfare Services, at 415 (McMillan & Co., 1968):

> There is still a general problem finding a sufficient number of adequate foster homes. An even greater problem is the difficulty of finding foster homes for emotionally disturbed children, mentally defective children, and children of minority racial backgrounds. The problem is further complicated by the fact that most foster parents want younger, preschool children, while many children needing foster care are older.

in such institutions or homes,[7] indicating that termination does not necessarily safeguard children from experiences that can damage them emotionally or psychologically -- and that termination may damage them even more than remaining in their natural family would have done. And even if a child is not physically abused in foster care, a child in state custody is still highly likely to be subjected with alarming frequency to the extremely damaging phenomenon

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[7] Children Without Homes at p. 6. (Report prepared by the Children's Defense Fund, 1978):

> Despite immense public concern about familial abuse, no state CDF staff visited had set up mechanisms, nor issued guidelines to monitor and eliminate the institutional abuse of children. Such abuse takes many forms: the unmonitored, excessive use of seclusion or drug therapies, severe behaviorial restrictions, or harsh physical punishment. Despite evidence that abuse of children in institutions and other group settings is widespread, no state studied had licensing statute spelling out specific sanctions for institutional abuse.

of multiple placements.[8] It is well-established that when children are moved from place to place, new attachments are severed and expectations of continuity, permanency and stability are shattered. As a result, children learn to avoid forming meaningful new relationships in order to avoid re-experiencing the trauma of separation.[9] Studies demonstrate the destructive

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[8] See, Cal. Legislature Joint Legislative Audit Comm., Report Of The State's Role Foster Care In California 7-8 (No. 148.2, 1974); H. Jeter, Children Problems and Services in Child Welfare Programs, 82 (1963); Mnookin, Foster Care - In Whose Best Interests, 43 Harv. Ed. Rev. 599, at 622-26 (1973); B. Mandell, Where Are The Children? 72, n. 10 (D.C. Heath & Co. 1973):

> A recent Seattle study showed that more than 6 of 10 foster children had undergone four or more moves. Half had been moved from four to seven times, and 12% had between eight and seventeen different placements. Only 5% remained in one home. (Jaffee and Kline, New Payment Patterns, p. 46.) Such dismal statistics clearly put the burden of proof upon the state to demonstrate that the state is, in fact, the better parent.

[9] See, Martin Wolins, "Another View of Group Care," Child Welfare, vol. 44, no. 1 (January 1965) at 15-16.

> The identity of a child in (a foster home) is often unclear, his stay is uncertain. He will probably find himself a wanderer, packing his affections, if any, and his problems and transferring them to at least several foster homes before he matures.

and potentially sociopathic consequences of such emotional trauma.[10/]

10/ J. Nemovicher, "A Comparative Study of Adopted Boys and Non-Adopted Boys in Respect of Specific Personality Characteristics," (Ph.D. dissertation, School of Education, New York University, 1959). Nemovicher compared thirty adopted boys with the same number of non-adopted boys and found that the adopted boys differed significantly from the control subjects in being more hostile, tense, dependent and fearful. See also Abraham S. Levine, "Substitute Child Care: Recent Research and Its Implications," Welfare In Review, vol. 10, no. 1, p. 3; B. Mandell, Where Are The Children?, at 72, n. 9 (D.C. Heath & Co. 1973):

> Maas and Engler [H. Maas and R. Engler, Jr., Children in Need of Parents, (N.Y.: Columbia University Press, 1959)] found that in the New England town of Brighton, foster children became more psychologically disturbed while in foster care than when they first came into care. Sixty-one percent of the foster children were confused about their identity. The children who returned home, however, were less likely to have psychological symptoms than were the children who stayed in foster care.

In addition to the harms and risks a child is exposed to while in foster care is the trauma a child invariably suffers upon being separated from a parent -- even an "unfit" one, and even when the separation has been performed in his or her "best interests."[11/] A child cannot so quickly

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11/ See, J. Goldstein, A. Freud and A. Solnit, Beyond the Best Interests of the Child, 20 (1973). Petitioners' relationship with their children was terminated on the basis of evidence which failed to indicate the children had suffered or would suffer specific articulable harm were the relationship allowed to continue. In addition, the vagueness of Delaware's statues, 13 Del. Code § 1103(4) and Del. Code § 1108, invites judges to inject their own biases into the decision-making process. See, e.g., In re New England Home for Little Wanderers, 367 Mass. 631, 328 N.E.2d 854 (1975) (parental rights terminated because mother took "unrealistic" approach to problems); In re Burell, 58 Ohio St. 2d 37, 388 N.E.2d 738 (1979) (per curiam) (removal of children threatened on the basis of standards similar to Delaware's when evidence demonstrated that mother lived with male companion); Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152 (children removed because father was a "romantic dreamer" and lead a bohemian life style), cert denied, 385 U.S. 949 (1966).

One author suggests that termination standards like Delaware's should be discarded altogether. See, Wald, State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 625 (1976); Wald, State Intervention on Behalf of Neglected Children: A Search for Realistic Standards, 27 Stan. L. Rev. 985 (1975). In their

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forget the memory of his parents. Even long after termination and placement in an adoptive home, children -- particularly older ones -- identify or may seek to identify with their natural parents.[12/] Significantly, studies show that a child's overall well-being is directly related to the ability to identify with natural parents over and above the ability to identify with foster or adoptive parents.[13/] Termination is additionally traumatic because children frequently view separation as punishment imposed for something they did wrong and about which they therefore feel guilty.[14/] Because state

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place Professor Wald suggests enacting consistent standards which would require the state, courts and child welfare personnel to show actual harm to the child at all stages of state intervention. Additionally, Professor Wald's proposal requires the use of maximum efforts to keep families together prior to removal through the delivery of protective services to the home.

12/ See, E. Weinstein, Self Image of the Foster Child, pp. 16-20 (1960).

13/ See, E. Weinstein, Self Image of the Foster Child, 15 (1960).

14/ See, J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child, 20 (1973).

intrusion introduces many new authority figures into a child's life, a child may experience conflicts of loyalty and anxiety about his or her future.[15] Ideally, of course, termination should result in the expeditious placement of children in stable, happy, permanent homes where their physical and emotional needs will be met. In fact, however, reality falls far short of that ideal.[16]

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[15] See, E. Weinstein, Self Image of the Foster Child, pp. 16-20 (1960).

[16]

> Frequently understaffed by inadequately trained personnel, applying outmoded concepts of child development and often rejecting social values dominant in the community, these [private and public] agencies operate almost totally independent of the courts in providing protective service for parents and in choosing an appropriate placement -- institutional, foster or adoptive -- for the child. . . . As a consequence, these agencies exercise almost unbridled discretion, and their decisions may or may not take into consideration those factors that should be relevant in child placement decisions. . . .

Sanford N. Katz, When Parents Fail, pp. 145-46 (Boston: Beacon Press, 1971). Numerous scholars have documented the harms that befall parents and children when the state intervenes. See, also, Mnookin, Foster Care - In Whose Best Interest, 43 Harv. Ed. Rev. 599 (1973); A.Gruber, Foster Home Care In Massachusetts: A Study of Foster Children, Their Biological and Foster Parents (1973).

When the trauma of permanent separation is aggravated by exposure to the harms and risks of foster care, a child stands little chance of growing up to be a healthy and productive human being. The most benevolently motivated termination decision may end one trauma but initiate many others. Because the rights implicated by termination are so fundamental, and its effects so far-reaching, the necessity for careful, precise, objective fact-finding cannot be overstated. A decision of this magnitude should plainly follow only the most exacting judicial scrutiny. To deny a child the most fundamental right and a fundamental relationship without due process of law, and to open the door to abuses that are all the more alarming because they are committed in the unreviewable discretion of the state -- and in the child's own name.

POINT II

FUNDAMENTAL FAIRNESS REQUIRES THE APPOINTMENT OF SEPARATE COUNSEL TO REPRESENT CHILDREN IN PROCEEDINGS WHICH MAY RESULT IN TERMINATION OF THEIR RIGHTS TO FAMILY INTEGRITY

This Court has repeatedly held the right to counsel to attach when a judicial proceeding brought by the state may result in a serious deprivation of liberty to a citizen. See, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972); Scott v. Illinois, 440 U.S. 367 (19.9). The Court has, in addition, specifically held that minors as well as adults are entitled to the benefit of this right, and that it applies in nominally "civil" cases initiated by the state in the exercise of its parens patriae power just as it does in nominally "criminal" cases. In re Gault, 387 U.S. 1 (1967). Moreover, although In re Gault involved a delinquency proceeding rather than a parental neglect or termination proceeding, in the Gault opinion, the Court quoted with approval a New York statute providing children with "the assistance of counsel of their own choosing or of law

guardians in neglect proceedings." 387 U.S. at 40.

The specific holding of Gault is plainly applicable to this case. There the Court said:

> We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parenst must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

387 U.S. 41. Gault involved "proceedings to determine delinquency," but Gault itself held that the name given by the state to a particular proceeding does not govern or define the constitutional rights implicated by the proceeding. Under the prior holdings of this Court, see Parham v. J.R., supra, the law of Delaware, and the law of numerous other states, the state acquires the unreviewable power to commit the child for whom it is the sole legal guardian to any number

of "institutions in which the juvenile's freedom is curtailed" -- such as mental institutions, hospitals, and possibly, as in Gault, "training schools" -- without ever having to appear before a court again. Thus, for the Roe children, the termination proceeding implicates, or may implicate,[17/] all of the same liberty interests as the delinquency proceedings at issue in Gault and, as demonstrated above, many additional liberty interests as well. See also Wisconsin v. Yoder, 406 U.S. 205, 243 (1972)(Douglas, J., dissenting in part).

It is precisely in recognition of such considerations that a study by the Institute of Judicial Administration/American Bar Association Joint Commission on Juvenile Justice Standards, Standards Relating to Abuse and Neglect, has proposed

> Appointment of counsel for child. Upon filing, the court should be required to appoint counsel at public expense to represent the child identified in the petition, as a party to the proceedings. . . ,

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17/ The record below, unreliable and underdeveloped as it is, still clearly suggests that at least one of the Roe children, Charles, may be retarded or handicapped.

and why the official Commentary on that provision explains

> There are good reasons to believe that this guarantee is constitutionally mandated in light of the significant consequences to the child if court wardship were ultimately imposed. . . . The reasoning underlying the Supreme Court's mandate of counsel for minors in In re Gault, 387 U.S. 1 (1967) thus applies readily to minors involved in wardship proceedings.

The necessity for requiring the appointment of counsel or of a law guardian in all termination and neglect proceedings as a matter of due process is well illustrated by the course of proceedings here. Delaware already has a local rule permitting the appointment of counsel to represent a child in the discretion of the trial court. Delaware Family Court Rule 360 provides that:

> The Court, at any stage of a proceeding, may appoint a guardian ad litem for a child if he has no parent or custodian appearing on his behalf, or the interests of the parent or custodian appear to conflict with those of the child.18/

18/ Despite this Court's clear holding in In re Gault, supra, that the Constitution requires the appointment of counsel in all delinquency proceedings, Del. Fam. Ct. R. 230 still provides that the right to counsel in such proceedings is also a matter of judicial discretion.

But as this Court said in Gault, "Nor can the judge represent the child," 387 U.S. 36, as this case amply demonstrates. Here, the trial judge, who had unilateral discretion under local law to consider and decide whether the children's interests required the appointment of counsel, initially neglected even to refer to -- let alone consider and evaluate -- those interests, even in this final and drastic context. And the trial judge's second opinion merely incanted the proper statutory language with no factual findings to support it and without hearing any evidence that could have supported any factual findings it might have made. In short, permitting the appointment of counsel for the child to rest in the discretion of the trial court often offers no protection for the child at all.

The record in this case thus once again juxtaposes the benevolent intentions of the Progressive era reformers who created modern family and juvenile court practice in this country with the institutional realities of twentieth century social welfare systems. Foster care, like the "training schools" at issue in Gault, is intended to benefit children, but in fact in many, many cases

it severely restricts personal liberty and has no "saving" or therapeutic effect at all. See Point IB, supra, and the authorities cited there. Because the interests of the children involved are so fundamental, and because, as this case illustrates, trial judges cannot be expected always to recognize potential conflicts of interest among the other parties' interests and those of the children, only an explicit holding that the Constitution mandates the separate representation of children in all termination proceedings will suffice to insure the protection of those interests.

The practical importance of separate counsel in trial court termination proceedings to the five children whose lives are at stake here is apparent from the record below. This is not a case in which the appointment of counsel would have been a hollow formalism. Separate representation may well have changed the outcome in this case. The failure of the lower courts to assure separate representation for these children is not only sufficient cause, by itself, for vacating the judgment below and remanding this case, but it has also led to other easily identifiable errors and omis-

sions which are, independently, of such separate constitutional magnitude as to require vacating the judgment below.

The most obvious of these other constitutional errors concerns the Delaware statutory requirement that the Court find that termination of parental rights be in the child's "best" interest. The Delaware statute requiring such a finding has not been challenged on grounds of vagueness either here or below, even though it is plainly no more certain in meaning than the "not fitted" element parent-appellants have chosen to attack on vagueness grounds.[19/]

19/ Indeed, the only provision of Delaware law that illuminates the legal meaning given by that state to the vague and ambiguous social work catchphrase "best interests of the child" in fact supports separate consideration of the individual child's desires and future prospects. Under a section of the Delaware Code having to do with private custody disputes, "best interests of the child" is defined to encompass,

> all relevant factors, including:
> (1) the wishes of the child's parent or parents as to his custody;
> (2) the wishes of the child as to his custodian;
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
> (4) the child's adjustment to his home, school, and community, and,

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In addition, appointment of separate counsel to represent the children would almost surely have avoided another fatal defect in these proceedings: the failure of any evidence to be adduced that would indicate that terminating parental rights would be "best" for them. The "best" interests standard is intrinsically comparative. The Oxford English Dictionary defines the word "best," for example, as "of the highest excellence; excelling all others in quality" (emphasis added). Webster's Seventh New Collegiate Dictionary defines "best" as "excelling all others." (emphasis added). Yet the lower court made no inquiry into the realistic alternative placements available for these children or any findings concerning

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> (5) the mental and physical health of all individuals involved.

13 Del. Code § 722(a)(emphasis added). The Delaware Supreme Court has held this statute to require a "broad inquiry" into the child's situation in proceedings to terminate parental rights, Matter of Three Minor Children, 406 A.2d 14 (Del. Sup. Ct. 1979), an inquiry which was plainly not conducted here.

whether those alternatives were "better" than terminating parental rights -- let alone "best." These children's most basic constitutional and human rights were thus adjudicated without considering any evidence going to what the Delaware Supreme Court has itself denominated an "essential pre-requisite" for such an adjudication. Under the principles enunciated by this Court in Thompson v. Louisville, 362 U.S. 199 (1960) and reiterated in Vachon v. New Hampshire, 414 U.S 478 (1974), the Delaware judgment appealed from here was therefore rendered in violation of the due process clause because it is "based on a record lacking any relevant evidence as to a crucial element," Vachon v. New Hampshire, supra at 480, in a matter concerning the most fundamental of human rights.

As this case illustrates, the benevolent theories of parens patriae intervention in family life have long ago broken down in practice, and are vulnerable to constitutional attack on numerous grounds. See Developments in the Law -- The Constitution and the Family, supra at 1221-1242. Even if none of the grounds raised by parent-appellants suffices to vacate or reverse the judgment below, the lower courts' failure effectively to consider the children's

interests, or to see to it that those interests were independently developed or presented, requires vacating the judgment below. The primary due process interests at issue in this case have not even been raised or briefed. On this record, it would be fundamentally unfair for the Court to permit a final adjudication concerning those interests to stand.

CONCLUSION

For the reasons set forth above, this Court should vacate the judgment of the Court below and remand this case for further proceedings in which the children are represented by separate counsel.

Respectfully submitted,

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